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Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State

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CONSENT TO SPERM RETRIEVAL AND INSEMINATION
AFTER DEATH OR PERSISTENT VEGETATIVE STATE

CARSON STRONG¹

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I. INTRODUCTION

Removal of sperm from a man's body after death was first reported in 1980, in a case involving a 30-year-old man who died following a motor vehicle accident and whose family requested that his sperm be extracted and frozen.² Since that time, more than ninety cases have been reported in which family members requested sperm retrieval from men who died³ or entered a persistent vegetative state⁴ (PVS), for the purpose of artificially inseminating a wife, girlfriend, or other woman.⁵ Several medical techniques for retrieving sperm have been described.⁶ In at least one case, such retrieval and insemination resulted in pregnancy and childbirth.⁷ Media coverage of this birth has raised public awareness of such sperm retrieval, and additional requests for it in the future seem likely. Although sperm retrieval could be performed for nonprocreative purposes, such as medical research, this paper focuses on cases in which the intent is procreative.

²Cappy Miles Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 FERTILITY AND STERILITY 512 (1980).

³Dead individuals include those whose hearts irreversibly stop beating and those whose heartbeat is maintained by machines but are brain dead. Brain death is defined as irreversible cessation of all functions of the entire brain, including the brain stem. UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 589 (1996). When there is irreversible loss of heartbeat, sperm retrieval must occur within 24 hours to obtain viable sperm. See Susan M. Kerr et al., *Postmortem Sperm Procurement*, 157 J. UROLOGY 2154 (1997).

⁴Dr. Fred Plum, who coined the term "persistent vegetative state" and is an expert on the subject, has described it as follows: "Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heartbeat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner." *In re Jobes*, 529 A. 2d 434, 438 (N.J. Sup. Ct. 1987).

⁵Many of these cases are documented in Kerr, *supra* note 3. See also Dana A. Ohl et al., *Procreation after Death or Mental Incompetence: Medical Advance or Technology Gone Awry?*, 66 FERTILITY AND STERILITY 889 (1996); Kenneth V. Iserson, *Sperm Donation from a Comatose, Dying Man*, 7 C.A.M.B. Q. HEALTHCARE ETHICS 209 (1998); Richard Pozda, *Sperm Collection in the Brain-Dead Patient*, 15 DIMENSIONS CRIT. CARE NURSING 98 (1996).

⁶One method involves surgical excision of the epididymis. See Rothman, *supra* note 2. Another approach involves irrigation or aspiration of the vas deferens. See Kerr, *supra* note 3, at 2154. Yet another method involves rectal insertion of a probe to induce electroejaculation. See Murphy F. Townsend et al., *Artificially Stimulated Ejaculation in the Brain Dead Patient: A Case Report*, 47 UROLOGY 760 (1996).

⁷Jane E. Allen, *Woman Pregnant By Sperm From Corpse*, Associated Press Online, REF5618 (July 15, 1998); Louinn Lota, *Baby Born From Dead Father's Sperm*, Associated Press Online, REF5876 (Mar. 26, 1999).

In these cases, death or PVS typically is caused by sudden illnesses, such as head trauma, rapidly-progressing infections, or asphyxiation. Because the illnesses are unanticipated, a typical feature of these cases has been the absence of the man's prior consent to sperm retrieval and artificial insemination. Despite the lack of such consent, sperm has been extracted in a number of cases in which requests have been made.⁸ Thus, these situations raise a number of ethical issues: Should procreation by means of sperm retrieval and artificial insemination after death or PVS be allowed? If so, is the man's consent ethically required? Should we value the freedom of wives or others to have sperm retrieved in these circumstances? In addition, a number of legal issues arise: What is the legal status of a man's prior consent to sperm retrieval and insemination after death or PVS? What is the legal status of consent by the spouse or other next of kin for such procedures? Should the man's consent to sperm retrieval and insemination after death or PVS be legally required?

Although a number of additional legal questions can be raised, including issues of paternity and inheritance, this paper focuses on the legal issues pertaining to consent, as well as the ethical questions raised above, which need to be discussed in order to address adequately the legal consent issues. The paper is organized as follows: first, the current law of consent to sperm retrieval and insemination after death or PVS is discussed in order to identify gaps in the law—areas that the law does not address or concerning which it is unclear; second, ethical issues are discussed that are relevant to deciding what the law should be; and third, based on the analysis of ethical issues, legal approaches are proposed that attempt to fill the gaps identified.

We shall see that the law of consent differs in some respects, depending on whether a patient is alive or dead. Because patients in PVS are legally alive,⁹ it will be necessary to consider separately cases involving PVS and those involving death. Specifically, Part II examines the current legal status of consent to retrieval and insemination in cases involving patients in PVS. Part III explores the current legal status of consent to retrieve sperm from dead patients. Part IV discusses the current law of consent in regard to artificial insemination using the sperm of dead patients. Part V puts forward and defends views concerning several ethical questions, including the following: Should sperm retrieval and insemination following death or PVS be permitted? Is the man's consent necessary? Part VI sets forth proposed legal approaches to cases involving patients in PVS, and Part VII states proposed legal approaches for cases involving dead patients.

II. THE LEGAL STATUS OF CONSENT TO SPERM RETRIEVAL AND INSEMINATION IN CASES OF PERSISTENT VEGETATIVE STATE

An analysis of the current law of consent, as applied to sperm extraction and insemination in PVS cases, can be divided into three areas: statutory law; the

⁸See, e.g., Rothman, *supra* note 2; Ohl, *supra* note 5; Lori B. Andrews, *The Sperminator*, N.Y. TIMES MAGAZINE, Mar. 28, 1999, at 62.

⁹Patients in PVS have at least some brain stem activity. See, e.g., *The Multi-Society Task Force on PVS, Medical Aspects of the Persistent Vegetative State*, 330 NEW ENG. J. MED. 1499, 1500 (1994). Thus, they do not meet the criterion for brain death, which requires irreversible cessation of functioning of the entire brain. See *supra* note 3.

common law of consent to medical treatment; and the right to consent to (or refuse) medical treatment implied by the constitutional right to privacy.

Two types of statutes might initially seem to be relevant to the consent situation in question: laws that establish the legal validity of Living Wills; and laws that establish Durable Power of Attorney for Health Care (DPAHC). These statutes establish two types of advance directives that enable patients to express their wishes concerning medical treatment in the event they become mentally incompetent to participate in decisions. Living Wills allow patients to specify those life-sustaining medical procedures they would want provided and those they would want withheld, should they become terminally ill.¹⁰ A signed and valid living will constitutes evidence of a patient's wishes, and it provides a legal basis for physicians to withhold or withdraw treatment in accordance with those wishes. DPAHC enables patients to appoint persons legally authorized to make decisions for them concerning medical treatment when the patients become mentally incompetent.¹¹ The consent to (or refusal of) medical treatment by such a surrogate is legally valid when given in accordance with statutes establishing DPAHC.

However, the wording of these statutes restricts the range of situations in which they are applicable. Living Will statutes usually are worded to apply specifically to decisions about life-preserving treatment. For example, the Uniform Rights of the Terminally Ill Act, which is the model act for living wills, is restricted in this manner, as explained in the Act's prefatory note:

The Rights of the Terminally Ill Act authorizes an adult person to control decisions regarding administration of life-preserving treatment in the event the person is in a terminal condition and is unable to participate in medical treatment decisions. As the preceding sentence indicates, the scope of the Act is narrow... It's impact is limited to treatment that is merely life-prolonging... Beyond its narrow scope, the Act is not intended to affect any existing rights and responsibilities of persons to make medical treatment decisions.¹²

Although DPAHC statutes usually are not restricted to decisions about life-preserving treatment, typically they are limited to decisions about treatment and diagnostic procedures.¹³ For example, the person appointed to act on the patient's behalf (the attorney-in-fact) might be authorized by statute to make health care decisions, where "health care" is defined in the statute as "any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition."¹⁴ Removing sperm in order to inseminate the wife is not a

¹⁰UNIF. RIGHTS OF THE TERMINALLY ILL ACT, 9B U.L.A. 609 (1987).

¹¹See, e.g., Sana Loue, *Living Wills, Durable Powers of Attorney for Health Care, and HIV Infection*, 16 J. LEGAL MED. 461 (1995); Alice Mead, *Durable Powers of Attroney for Healthcare*, 39 PRAC. LAW. 39 (1993). DPAHC statutes also allow patients to specify procedures that they would want provided or withheld. See Loue, at 468.

¹²UNIF. RIGHTS OF THE TERMINALLY ILL ACT (Prefatory Note), 9B U.L.A. 609 (1987).

¹³Loue, *supra* note 11, at 467. Mead, *supra* note 11, at 40.

¹⁴See, e.g., TENN. CODE ANN. §§ 34-6-201, 202 (1996). See also UNIF. LAW COMMISSIONERS' MODEL HEALTH-CARE CONSENT ACT §§ 1, 6, 9 pt. 1 U.L.A. 453 (1988).

diagnostic procedure, and it is not treatment for the man in PVS. Because of their wording, Living Will and DPAHC statutes cannot reasonably be interpreted as applying to sperm retrieval or artificial insemination.

It might be asked whether the more general Durable Power of Attorney (DPA) statutes could be used to create an authority to consent to sperm retrieval and insemination after PVS. After all, courts have recognized DPA statutes as a device for appointing surrogate decision makers for health care.¹⁵ In reply, we should keep in mind a precept of the law of agency, according to which an agent cannot do what the principal is not authorized to do.¹⁶ A question that needs to be explored is whether a patient is authorized under current law to consent (in advance) to sperm retrieval and insemination after onset of PVS. This will be discussed in the following sections.

A. *Common Law of Informed Consent and Advance Directives*

In addition to advance directives that are given validity by statute, advance directives are recognized in common law. These nonstatutory advance directives generally fall into two categories: living wills executed by patients in states that lack living will statutes; and conversations between patients and others, in which patients express their wishes concerning future treatment.¹⁷ The basis of these nonstatutory directives is the common law doctrine of informed consent, which recognizes the right of mentally competent persons to decide what medical procedures will be performed upon their bodies.¹⁸ As stated by Justice Cardozo, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."¹⁹ Courts have recognized that a logical corollary of the right to informed consent is the right to refuse treatment.²⁰ Moreover, courts have held that the onset of mental incompetence does not negate a person's interest in refusing medical treatment.²¹ Thus, a number of courts have held that life-preserving medical treatment may be withheld or withdrawn from mentally incompetent patients when there is sufficient evidence, in the form of written or verbal statements by the patient when previously competent,

¹⁵*In re Hilda M. Peter*, 529 A.2d 419 (N.J. 1987).

¹⁶3 AM.JUR.2D *Agency* § 71 (1986).

¹⁷Gregory G. Sarno, Annotation, *Living Wills: Validity, Construction, and Effect*, 49 A.L.R.4TH 812, 813-16 (1986); *In re Conroy*, 486 A.2d 1209, 1229 (N.J. Sup. Ct. 1985); Alan Meisel, *Legal Myths About Terminating Life Support*, 151 ARCH. INTERN. MED. 1497, 1501 (1991). For an example of the former type of nonstatutory advance directive, see *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So.2d 921 (Fla. 1984); for an example of the latter type, see *In re Gardner*, 534 A.2d 947 (Me. 1987).

¹⁸W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 189-192 (5th ed. 1984).

¹⁹*Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914).

²⁰See *Conroy*, 486 A.2d at 1222.

²¹*In re Quinlan*, 355 A.2d 647, 664 (N.J. Sup. Ct. 1976); *Conroy*, 486 A.2d at 1229.

that such withholding is in accordance with the patient's wishes.²² In light of these rulings, the American Medical Association has recommended that requests by competent patients not to receive life-prolonging treatment in the event they enter a terminal state be documented in the patient's chart.²³

Although prior verbal or written statements by patients have provided the basis for medical decisions under the informed consent doctrine, one should note the limited range of factual situations in which courts have applied such advance directives. Virtually all the cases have involved decisions about withholding or withdrawing life-prolonging treatment for patients who were terminally ill or in PVS. No court has been asked to rule on whether advance directives are applicable to sperm retrieval or insemination for patients in PVS. Whether courts should extend the doctrine of advance directives to cover sperm retrieval and insemination will be discussed later in this paper.

B. Common Law Authority of Next of Kin to Consent

In the absence of a Living Will or DPAHC that is executed in compliance with applicable state statutes, common law holds that the next of kin has legal authority to consent to the providing or withholding of life-preserving medical treatment for mentally incompetent patients.²⁴ However, decisions by the next of kin must follow certain principles, referred to as the "substituted judgment standard" and the "best interests standard". The substituted judgment standard most clearly applies in cases involving patients who previously were mentally competent. According to this standard, the next of kin should attempt to determine what course of medical treatment the patient, if competent, would choose.²⁵ This implies that if the wishes of the previously competent patient are known, they should be followed. If the patient's wishes concerning provision of life-preserving treatment are unknown, then the best interests standard applies, according to which the next of kin should attempt to make the decision that best promotes the welfare of the patient.²⁶

In principle, it would be possible to use the substituted judgment standard to decide in favor of sperm retrieval and insemination, assuming the patient had previously expressed a desire to have these procedures performed. If the patient has not expressed his wishes, then the question arises as to whether the best interests standard could provide a basis for sperm retrieval and insemination. In such

²²See e.g., *In re Eichner* 420 N.E.2d 64 (N.Y. 1981); *Conroy*, 486 A.2d 1209; *In re Lydia E. Hall Hospital*, 455 N.Y.S. 2d 706 (1982). Exceptions to the rule of permitting treatment refusal are put forward in *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E. 2d 417, 425-27 (Mass. 1977).

²³COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS, § 2.22 at 67 (1998). See also David Orentlicher, *Advance Medical Directives*, 263 JAMA 2365 (1990).

²⁴See, e.g., Sarno, *supra* note 17, at 815; *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd* 379 So.2d 359 (Fla. 1980); *Kennedy Hospital*, 452 So.2d 921.

²⁵Sarno, *supra* note 17, at 815; *Conroy*, 486 A.2d 1209.

²⁶Lawrence W. Vernaglia, Annotation, *Propriety of, and Liability Related to, Issuance or Enforcement of Do Not Resuscitate (DNR) Orders*, 46 A.L.R.5TH 793, 804-5 (1997); *Conroy*, 486 A.2d 1209.

circumstances, it would be difficult to argue that the patient's best interests requires the carrying out of sperm extraction and insemination. Because his wishes are unknown, there is no way to know whether such procedures would satisfy a desire he might have had. Because he is permanently unconscious, he would never derive satisfaction or benefit from an awareness of such procedures being carried out. Thus, it is doubtful that the best interests standard could be used in this way.

Although the substituted judgment standard could in principle be used, it should be pointed out that this standard has only been applied by courts in a limited range of situations. Again, all the reported cases have focused on decisions about withholding or withdrawing life-prolonging treatment for patients who were terminally ill or in PVS. No court has ruled on whether the substituted judgment doctrine is applicable to sperm retrieval and insemination for patients in PVS. Whether courts should apply the substituted judgment standard in such cases will also be explored later in this paper.

C. *Persistent Vegetative State and the Constitutional Right to Privacy*

The Supreme Court first articulated the right to privacy in *Griswold v. Connecticut*, which held that married couples have a constitutional right to use contraceptives.²⁷ In *Roe v. Wade*, the Court extended the right to privacy to cover a woman's decision to abort a pregnancy.²⁸ Although these cases pertain to freedom to avoid procreation—through contraception and abortion—other Supreme Court cases indicate that there is a constitutionally protected interest in freedom to procreate. In *Skinner v. Oklahoma*, the Court declared an Oklahoma statute authorizing the sterilization of habitual criminals to be unconstitutional, stating that “we are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”²⁹ In *Loving v. Virginia*, the Court struck down Virginia's ban on interracial marriages, holding that the Due Process Clause of the Fourteenth Amendment entails a right to choose one's spouse, thus rendering a decision that can be interpreted as protecting freedom to procreate.³⁰

In addition to cases involving procreation, cases involving withholding treatment have invoked the right to privacy. In the case of *In re Quinlan*, the New Jersey Supreme Court held that the right to privacy “is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances.”³¹ In *Cruzan v. Director, Missouri Department of Health*, the U.S. Supreme Court stated explicitly that there is a constitutionally protected liberty interest in refusing unwanted medical treatment.³² Some courts have based the right of incompetent patients to refuse treatment on both the common law doctrine of informed consent

²⁷*Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁸*Roe v. Wade*, 410 U.S. 113 (1973).

²⁹*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941).

³⁰*Loving v. Virginia*, 388 U.S. 1, 12 (1967).

³¹*Quinlan*, 355 A.2d at 663.

³²*Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990)

and the constitutional right to privacy.³³ The constitutional cases involving interests in procreation and in refusing medical treatment raise several questions: Does the constitutionally protected freedom to procreate extend to procreation after an individual becomes irreversibly unconscious? Does the constitutional interest of a patient in PVS to refuse medical treatment include an interest in refusing sperm retrieval?

To summarize this part, Living Will and DPAHC statutes, as currently written, are not applicable to sperm retrieval and insemination after PVS. It is unclear whether the common law doctrines of advance directives and substituted judgment should be extended to such cases. Because it is unclear that the patient has legal authority to consent, it is unclear whether an attorney-in-fact appointed under a DPA statute would be authorized to consent. Furthermore, because no statute or court has addressed these issues, it follows that no statute or court has held that the consent of the patient is legally required.

III. THE LEGAL STATUS OF CONSENT TO POSTMORTEM SPERM RETRIEVAL

Discussion of the current law of consent, as applied to postmortem sperm removal and insemination, can be organized into these areas: statutory law; common law concerning the disposition of dead bodies; and the constitutional right to privacy.

The question arises whether any statutes are relevant to the validity of consent to postmortem sperm retrieval. One might initially think that the Uniform Anatomical Gift Act (UAGA) is relevant. State laws modeled on the UAGA establish the validity of consent by the patient or next of kin to removal of organs and tissues after death. However, the UAGA places restrictions on the purposes for which body parts can be removed. Section 2(a) of the Act states that "An individual who is at least [18] years of age may . . . make an anatomical gift for any of the purposes stated in Section 6(a) . . ."³⁴ Furthermore, according to Section 6(a):

The following persons may become donees of anatomical gifts for the purposes stated:

- 1) a hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;
- 2) an accredited medical or dental school, college, or university for education, research, advancement of medical or dental science; or
- 3) a designated individual for transplantation or therapy needed by that individual.³⁵

Postmortem sperm retrieval and subsequent insemination do not appear to constitute transplantation or therapy, as those terms ordinarily are understood. Moreover, the purpose of retrieval in the types of cases under consideration is not medical research

³³*Saikewicz*, 370 N.E. 2d 417.

³⁴UNIF. ANATOMICAL GIFT ACT § 2, 8A U.L.A. 19, 33 (1993).

³⁵UNIF. ANATOMICAL GIFT ACT § 6 U.L.A. 53.

or education, but attempted procreation using the patient's sperm. Thus, it is doubtful that the UAGA in its current form can reasonably be construed as authorizing sperm retrieval for the purpose of impregnating the widow of the deceased.

A. *Common Law on Disposition of Dead Bodies*

At common law, the next of kin has a right to make decisions concerning the disposition of dead bodies.³⁶ However, this right is defined narrowly, based on the common law principle that there is no right of property, in a strict or commercial sense, in dead bodies.³⁷ Courts have used the term "quasi-property rights" in describing the interests of the surviving spouse or next of kin in controlling what is done to the dead bodies of loved ones.³⁸ The main purpose of this "quasi-property" right is not prevention of injury to the dead body itself, but prevention of improper actions to the body that would offend or cause emotional harm to surviving family members.³⁹ The right in question has been described as a right to bury the body in the condition in which it was found when the decedent died.⁴⁰ It consists of a right to make decisions concerning burial or cremation, including the time, place, and manner of interment. In the absence of statutes that specify otherwise, this range of decisions constitutes the *only* right the next of kin has in a dead body.⁴¹ Examples of statutory rights of the next of kin to make decisions include the right to consent to organ removal for transplantation, in the absence of contrary indications by the deceased, and the right to consent to an autopsy. In addition, even these limited rights of the next of kin to make decisions about the body can be overridden by court order or statute when required by the demands of justice or the public good.⁴² An example would be legislation authorizing an autopsy without the next of kin's consent when death is caused by violence or an accident.

It might be asked whether the decedent's own wishes concerning disposition of his body is recognized under common law as authorizing such disposition. Discussion of this question can be divided into testamentary and nontestamentary expressions of the decedent's wishes. To begin, a number of cases have addressed this question where the decedent's preferences were expressed orally or in writing other than a will. Analysis of these cases indicates that "...it has always been extremely problematical whether a person's attempted oral or nontestamentary

³⁶25A C.J.S. *Dead Bodies* § 3 at 491-93 (1966).

³⁷25A C.J.S. *Dead Bodies* § 3 at 489.

³⁸See Thomas L. O'Carroll, *Over My Dead Body: Recognizing Property Rights in Corpses*, 29 J. HEALTH & HOSP. L. 238 (1996). See also Noralyn O. Harlow, Annotation, *Statutes Authorizing Removal of Body Parts for Transplant: Validity and Construction*, 54 A.L.R.4TH 1214, 1216 (1987).

³⁹O'Carroll, *supra* note 38, at 239. See also Anne Reichman Schiff, *Arising From the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 923-28 (1997).

⁴⁰22 AM. JUR. 2D *Dead Bodies* § 32 (1988); James O. Pearson, Jr., Annotation, *Liability for Wrongful Autopsy*, 18 A.L.R.4TH 858, 862 (1982).

⁴¹25A C.J.S. *Dead Bodies* § 2 at 490 (1966); O'Carroll, *supra* note 38, at 239.

⁴²See 25A C.J.S. *Dead Bodies* §§ 2, 3.

written disposition of his body will be enforced."⁴³ Courts generally have held that the decedent's wishes should be given consideration, but that the decision about whether to carry them out should be made in light of additional interests that might be relevant, which can include the wishes and feelings of the surviving spouse or other family members, as well as the interests of the public. When the decedent's preferences conflict with these other interests, courts generally decide which interests should have priority on a case-by-case basis, after examining the circumstances of the particular case. In a number of cases, the decedent's wishes have been overruled.⁴⁴ When the decedent's preferences are expressed in a will, there still is no guarantee that courts will uphold them. Although courts have held that a person has a right to dispose of his own body by will, some courts have permitted the wishes of the surviving spouse or next of kin to prevail over the wishes of the deceased, reflecting the fact that there is not a strict property interest in dead bodies.⁴⁵ Thus, this body of law does not create a requirement of consent by the deceased, nor does it establish the decedant's prior wishes as determinative.

B. *Dead Bodies and the Constitutional Right to Privacy*

The advent of postmortem sperm retrieval and insemination raises a number of questions concerning how far the right to privacy extends: Does the constitutionally protected freedom to procreate extend to posthumous procreation? If so, could a legal justification for honoring a man's prior request for postmortem sperm retrieval be based on this constitutional protection? Similarly, does the constitutionally protected freedom not to procreate include freedom to refuse postmortem sperm retrieval? To date, these specific constitutional questions have not been addressed by the courts.

To summarize, the law at present does not authorize the next of kin to consent to postmortem sperm retrieval or insemination. Moreover, the law does not clearly grant validity to the patient's prior consent to these procedures. In addition, because no statute or court has addressed these issues, it follows that no statute or court has held that the consent of the patient is legally required for the performance of these procedures.

IV. THE LEGAL STATUS OF CONSENT TO POSTMORTEM USE OF SPERM FOR ARTIFICIAL INSEMINATION

Currently there are no statutes that establish the validity of consent to use a man's sperm for artificial insemination after he dies. Although the Uniform Parentage Act sets forth legal rules concerning the paternity of children conceived posthumously, it does not address consent to the medical procedure of artificial insemination.⁴⁶

⁴³Frank D. Wagner, Annotation, *Enforcement of Preference Expressed by Decedent as to Disposition of His Body After Death*, 54 A.L.R.3D 1037, 1040 (1973).

⁴⁴Wagner, *supra* note 43, at 1040-41, 1057, 1063, 1066.

⁴⁵B. C. Ricketts, Annotation, *Validity and Effect of Testamentary Direction as to Disposition of Testator's Body*, 7 A.L.R.3D 747, 749 (1966).

⁴⁶UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1987). See also John A. Gibbons, *Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. COMTEMP. HEALTH L. & POL'Y 187, 206 (1997).

Moreover, the UAGA, as discussed above, authorizes anatomical gifts only for the purposes of transplantation, therapy, education, and research.⁴⁷ Thus, it does not confer validity to consent by the man or next of kin to use sperm for the purpose of procreation.

To date, there is only one court decision in the United States that has potential relevance to the question of consent to postmortem use of sperm for artificial insemination. That case, *Hecht v. Superior Court*, involved a bequest of frozen sperm by William Kane to his girlfriend Deborah Hecht.⁴⁸ Kane had deposited 15 vials of his sperm in a sperm bank and signed a storage agreement specifying that in the event of his death the sperm bank should release the vials to Deborah Hecht. Kane also executed a will in which he bequeathed the sperm and most of his estate to Hecht, and in which he expressed the intention that the sperm be available for the insemination of Hecht, should she so desire. Subsequently Kane committed suicide, and he was survived by two college-age children of his former wife, whom he had divorced years before. The children contested the will, including the bequest of sperm to Hecht, in an attempt to prevent the birth of future half-siblings.

At one point in the ensuing legal proceedings, the appellate court overturned the trial court's order that the children's request to have the sperm destroyed be carried out. In its decision, the appeals court held that Kane had an interest in controlling the use of his sperm for reproduction. Specifically, the court wrote, "We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction."⁴⁹ The *Hecht* court also discussed, with approval, the decision of a French court to allow the sperm of a dead man to be used by his wife for insemination, based on evidence that the man wanted the insemination to occur.⁵⁰ It should be noted that the *Hecht* court did not explicitly state that the decedent's previously stated wishes constituted legally valid consent. However, its comments imply approval of the view that the insemination of Hecht should be legally permissible. Its decision arguably could provide a precedent that would permit insemination based on the deceased person's wishes.

Postmortem use of sperm for artificial insemination raises additional questions for the right to privacy: Could a legal justification for carrying out a man's prior request for postmortem artificial insemination be grounded on the right to privacy? Could a justification for honoring a man's previous refusal of postmortem insemination rest on the right to privacy? These constitutional questions have not yet been addressed by the courts.

In summary, the law at present does not clearly confer validity on the consent of the patient or next of kin for insemination following death. However, one could

⁴⁷*Supra* text accompanying notes 34-35.

⁴⁸*Hecht v. Superior Court*, 16 Cal. App. 4th 836 (1993). See also Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 239-41 (1997); Andrea Corvalán, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335, 344-47 (1997).

⁴⁹*Hecht*, 16 Cal. App. 4th at 850.

⁵⁰For a discussion of this case, which involved Alain and Corinne Parpalaix, see *id.* at 855-57. See also E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 229-233 (1986-87).

argue for the validity of patient consent, based on the *Hecht* decision, provided the patient's wishes had been clearly expressed. Also, no statute or court, including the *Hecht* court, has stated that the man's consent is legally required for postmortem artificial insemination.

V. SHOULD SPERM RETRIEVAL AND INSEMINATION BE PERMITTED IN THESE CASES?

As the above discussion indicates, under current law in the United States no one has clear legal authority to consent to sperm retrieval or insemination after death or PVS, including the patient and the patient's next of kin. Moreover, there is no existing legal requirement that the patient's consent be obtained prior to such procedures. This lacuna in the law needs to be addressed, and it raises the question of what the law should say about these matters. Should such retrieval and insemination be legally permitted? If so, who should have legal authority to give consent, and under what circumstances?

Our answers to these legal questions should be based on our answers to certain underlying ethical questions: Is procreation following death or PVS something that should be valued? Should sperm retrieval and insemination in these cases be permitted? Is it ethical to retrieve sperm from patients who are dead or in PVS but have not given prior consent? This section puts forward and attempts to defend answers to these ethical questions, in order to provide a basis for discussing in the following sections what the law should be.

A. *Should We Value Freedom to Procreate (or Not Procreate) After Death or PVS?*

To explore whether freedom to procreate after death or PVS should be valued, let us begin with situations in which the patient has given explicit prior consent to sperm retrieval and subsequent insemination of his wife. Let us also assume that the wife agrees to the carrying out of these procedures. The term "explicit prior consent" is used here to refer to verbal or written consent that the man gives directly to health care professionals. Although no cases to date have involved such explicit consent, one can imagine a scenario in which a patient discusses such matters in advance with his physician. It is useful to begin with this type of situation, in which the physician has direct knowledge of the patient's wishes; later we shall consider situations in which there is absence of explicit prior consent, as well as situations involving a girlfriend rather than a wife.

To consider whether individuals should have *freedom* to procreate after death or PVS, it is necessary to ask whether *procreation* in this type of scenario is something that individuals can reasonably value. One approach to answering the latter question is to begin by asking why procreation is important to individuals in more ordinary contexts. Here, "ordinary" refers to the more common form of procreation in which a couple conceives by sexual intercourse and then raises the child who is born. The strategy being employed is to try to understand why procreation is meaningful to individuals in the ordinary scenario, and then consider whether any of the identified reasons also apply when the patient has died or entered PVS. If some of them apply, they would lend support to permitting attempted procreation after death or PVS, in at least some cases.

Research has identified a number of reasons people actually give for wanting to procreate.⁵¹ However, some of the reasons that have been given seem confused or selfish. For example, some have said that they desire to procreate in order to save a troubled marriage. This reason can be criticized because it fails to deal with the cause of the marital problems, and the stresses of raising the child could further strain the marital relationship. Another example involves people who say they want to have genetic offspring in order to demonstrate their femininity or virility. This type of reason seems to be based on the view that women must have babies in order to prove their femininity and that virility is central to the worth of a man. It can be criticized for stereotyping sex roles and overlooking ways of enhancing self-esteem other than having children. Some authors have suggested that the desire to procreate is always unreasonable, as in these examples.⁵² Rather than accept this pronouncement, we should consider whether there are defensible reasons people can give for wanting to procreate.

At least six reasons have been identified that persons could give to support the reasonableness of their desire to have genetic offspring. These are reasons that individuals could put forward in explaining why procreation is meaningful and important to them: (1) procreation involves participation in the creation of a person; (2) it can be an affirmation of mutual love; (3) it can contribute to sexual intimacy; (4) it can provide a link to future persons; (5) it can involve experiences associated with pregnancy and childbirth; and (6) it can involve experiences of child rearing.⁵³ This is not meant to imply that persons *ought* to have these reasons, or even that persons ought to desire to procreate, but only that the desire to procreate can be defended by appealing to such reasons.

These reasons suggest that having genetic offspring can be valuable to a person, in part, because it can contribute to one's self-identity. For example, participating in the creation of a person can become part of one's self-identity. Similarly, whether one has gestated, reared, or obtained a certain type of link to the future can be part of one's sense of who one is. These reasons also suggest that procreation can, in some cases, contribute to self-fulfillment, for it can result in marital love being enriched and marital intimacy being deepened.⁵⁴ These considerations help explain why freedom to procreate in the ordinary context should be valued; namely because procreation can be important to persons in the ways identified, including contributing to self-identity and self-fulfillment.

There are other reasons why freedom *not* to procreate is valuable to persons. First, it is valuable because it is important for directing the course of one's life. Gestating and raising children is a large undertaking that can compete with other

⁵¹See, e.g., Jean E. Veevers, *The Social Meanings of Parenthood*, 36 *PSYCHIATRY* 291 (1973); Edward Pohlman, *Motivations in Wanting Conceptions*, in *PRONATALISM* 159 (Ellen Peck & Judith Senderowitz eds., 1974); FRED ARNOLD ET AL., *THE VALUE OF CHILDREN: A CROSS-NATIONAL STUDY* (1975); EULAH CROSON LAUCKS, *THE MEANING OF CHILDREN: ATTITUDES AND OPINIONS OF A SELECTED GROUP OF U.S. UNIVERSITY GRADUATES* (1981).

⁵²See e.g., Axel Kahn, *Clone Mammals...Clone Man?* 386 *NATURE* 119 (1997).

⁵³CARSON STRONG, *ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE: A NEW FRAMEWORK* 18-22 (1997).

⁵⁴For additional discussion of these six reasons and their implications for self-identity and self-fulfillment, see *Id.* ch. 1.

projects and goals in one's life by placing demands on one's time, energy, and resources. Thus, in the ordinary context, self-determination in making major life choices is promoted by freedom to choose whether to have children (or, for those who already have children, to choose whether to have additional children).⁵⁵ Second, being able to affect the circumstances in which one's children are raised might be important to some. Freedom not to procreate permits some to avoid rearing circumstances they consider undesirable, perhaps to postpone procreation until circumstances they regard as more favorable occur.

Now let us consider whether these reasons for valuing procreative freedom are applicable to sperm retrieval and insemination after death or PVS. A man's previously stated wishes might be either that his sperm be used or that it not be used for procreative purposes after dying or entering PVS. Let us begin with the scenario in which the man stated that he would want his sperm to be used. Although some of the reasons for valuing freedom to procreate identified above do not apply to this situation, it appears that the following reasons can be applicable.

First, such retrieval and insemination could involve participating in the creation of a person. Such participation can be meaningful to individuals for a number of reasons. For some, the idea of bringing into being an individual who develops self-consciousness might be important. For others, the significance of participation in the creation of a person might be religious; some might regard it as acting as an instrument of God's will, while others might see it as fulfillment of a religious duty. Perhaps not everyone who has children thinks about it in terms of creating a person, but this is a reason that can be given to justify the desire to procreate. Furthermore, it is reasonable to say that a man can participate in the creation of a person even though the insemination occurs after he has died or entered PVS. After all, the man can take actions while he is mentally competent that will cause the insemination to occur, and it is his sperm that would be used. Admittedly, the man would never know whether the attempt to create a person would be successful. Nevertheless, the plan to create a person and the hope that the plan succeeds could be meaningful to an individual and could contribute to self-identity.

Second, intentionally having offspring can be an affirmation of a couple's mutual love and acceptance of each other. It can be a deep expression of acceptance to say to another, in effect, "I want your genes to contribute to the genetic makeup of my children." Similarly, a plan to procreate even if one member of a couple dies or enters PVS could be an affirmation of mutual love and acceptance. There have been cases in which procreation after the death of one member of the couple has been planned and has had this sort of special meaning for the couple.⁵⁶ There is no reason why similar considerations and feelings could not occur in a case involving PVS. This affirmation and its personal meaning to the couple can be strong even though they know that, in the circumstances envisioned, one member of the couple would be "gone".

⁵⁵See David A. J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 1000 (1979).

⁵⁶This appears to have been a feature of the Parpalaix case, which is discussed in *Hecht*, 16 Cal. App 4th at 850; Shapiro & Sonnenblick, *supra* note 50, at 229-33.

Third, procreation can be valued by some because it provides a link to future persons. There might be several ways in which such a link could have personal meaning. Some might consider it important to have a family line that continues. Others might find it significant to play a role in the continuation of humanity. Such a link to the future can be created even though conception occurs after one dies or enters PVS. Although the man would never know whether the link actually occurred, a plan to create it could have personal significance and contribute to self-identity.

Thus, persons can give significant reasons for valuing procreation after death or PVS. Because such reasons can be given, freedom to attempt procreation in such circumstances deserves at least some degree of respect. Admittedly, plans to procreate after death or PVS might not play as central a role in a person's life as does procreation in the ordinary scenario. In the ordinary context, where one becomes a rearing parent, procreating usually has a greater impact on one's life plans, as well as on one's self-fulfillment and self-identity. For this reason, the argument for respecting freedom to procreate in the ordinary scenario is *stronger* than the argument for respecting freedom to procreate after death or PVS. Even so, decisions to attempt procreation after death or PVS can be meaningful to some persons for the reasons discussed, and this gives the argument for respecting such decisions at least some degree of strength.

This view disagrees with the idea, expressed by John Robertson, that freedom to procreate after death has little importance. Robertson points out that experiences associated with procreation after death would be an attenuated version of the experiences involved in procreating during one's lifetime. He further states, "Indeed, it is so attenuated that one could argue it is not an important reproductive experience at all..."⁵⁷ In reply, if procreation were meaningful to individuals only because it involves experiences associated with gestating and rearing children, then it would be true that procreation after death or PVS can have little importance. However, in exploring why procreation is meaningful to persons, we have seen that other reasons matter as well. When account is taken of desires to participate in the creation of a person, to affirm mutual love, and to have a link to the future, it is possible to understand that some plans to procreate after death or PVS can be important to individuals. A middle ground seems reasonable, between the extremes of saying that such plans have no importance and saying that they are equal in importance to procreation in the ordinary context.

A second possibility is that a man would state a wish not to procreate after death or PVS. Although some of the main reasons for valuing freedom not to procreate in the ordinary context do not apply to procreation after death or PVS, at least one can; namely, the desire to avoid bringing a child into being in circumstances the person considers undesirable for rearing. Some men might be opposed to creating a child when they would be unable to participate in rearing. It should be acknowledged that freedom not to procreate after death or PVS has less impact on one's life than freedom not to procreate during one's lifetime. Thus, the argument for respecting

⁵⁷John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1032 (1994). Prof. Robertson's view appears to be accepted by Sheri Gilbert, *Fatherhood From the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 551-54 (1993). See also John A. Robertson, *Posthumous Reproduction*, in FERTILITY AND REPRODUCTIVE MEDICINE 255 (R. D. Kempers et al., eds., 1998).

freedom not to procreate when alive is stronger than the argument for respecting freedom not to procreate after death or PVS. Nevertheless, avoiding procreation after death or PVS can be important to some persons, and this gives the argument for respecting those decisions some degree of strength.

B. Argument for Sometimes Permitting Sperm Retrieval and Insemination After Death or Persistent Vegetative State

Drawing on the above discussion, it is possible to put forward an argument for permitting sperm retrieval and insemination after death or PVS, in at least some cases. Again we assume, for sake of argument, that the man has given explicit prior consent to health care professionals for extracting his sperm and using it to artificially inseminate his wife. Let us also assume that the wife wants to have the sperm removed and to be inseminated. At least two main ethical considerations support permitting these procedures in this type of situation. First, performing these procedures would promote the man's freedom to make decisions when alive and competent concerning procreation after death or PVS. As discussed above, it is possible to have good reasons for wanting to procreate after death or PVS. The fact that good reasons are possible gives us a rationale for respecting freedom to procreate after death or PVS. Although the reasons are not as strong as the reasons for respecting freedom to procreate when the person is alive and conscious, they carry at least some degree of weight and provide a reason for respecting the man's wishes. Second, given that the wife also requests the retrieval and insemination, carrying out these procedures promotes her freedom to procreate. A number of reasons for valuing procreation in the ordinary scenario could apply to her, including the following: the procreation in question could permit her to participate in the creation of a person; it could give her a way to affirm her love for her husband; it could provide a link to future persons that might be meaningful to her; and it could enable her to experience pregnancy, childbirth, and child rearing. If procreation in the ordinary context is valuable in part because it can be meaningful to persons in these ways, then it seems that the woman's procreation using sperm retrieved after death or PVS could be valuable to her for the same reasons. Moreover, the qualification made above, that the argument for respecting procreation after death or PVS is weaker than the argument for respecting procreation when alive and conscious, is not applicable. For the woman, the procreation in question would occur during a time when she is alive and conscious. Because so many of the reasons that can be given in the ordinary scenario are applicable, her procreative freedom should be regarded as having a degree of importance close to, if not the same as, that of procreative freedom in the ordinary context.

C. When the Man's Wishes Can Reasonably Be Inferred

The above discussion assumes that the man gave explicit written or verbal consent to health care providers. Now let us suppose that consent was not given directly to health care providers, but that there is sufficient evidence to justify a conclusion that he would have wanted to have sperm removed and his wife inseminated. Evidence that is satisfactory in this context might include prior statements made by the man to family members or friends that expressed his wishes concerning sperm retrieval after death or PVS, or it might consist of a prior written

statement prepared when he was mentally competent and witnessed by others.⁵⁸ Let us also assume, as before, that the wife wants sperm removed and to be artificially inseminated. The question arises as to whether sperm retrieval and insemination should also be permitted in this type of situation. It can be argued that the procedures should be permitted, based on the same ethical argument given above, and *also* on an analogy to discontinuing life-preserving treatment for patients in PVS.

The ethical argument given above applies not only when there is explicit prior consent, but also when there is sufficient evidence to infer that the man would want retrieval and insemination. We have seen that it is possible to have good reasons for wanting to procreate after death or PVS. Acting in accordance with the man's reasonably inferred wishes would respect his freedom to make decisions concerning procreation after death or PVS. Assuming the wife also wants the retrieval and insemination, performing these procedures would respect her procreative freedom.

This type of situation is analogous to those involving decisions about life-preserving treatment for patients in PVS. In particular, consider cases in which patients in PVS have not previously discussed withholding life-prolonging treatment with their physicians. In such circumstances, it is ethically appropriate to ask families whether patients have a Living Will or had engaged in conversations in which they expressed their wishes about life-sustaining treatment. If there is sufficient evidence that the patient would want treatment withheld, then respect for those wishes would be a major part of the ethical justification for withholding it. Similar considerations would seem to apply when the decision is concerned not with life-prolonging treatment but with sperm retrieval and insemination. Respect for the autonomy of the previously alive and mentally competent person is an important ethical consideration in both types of situations. If there is sufficient evidence that the man would want sperm retrieval and insemination, then his freedom to procreate would be promoted by performing those procedures. As before, the wife's freedom to procreate would be an important consideration, as well.

Similarly, when the man is dead instead of in PVS, the same ethical arguments apply; respect for the autonomy of the previously alive and mentally competent person is ethically relevant, whether the man is now in PVS or dead.

D. Is the Man's Explicit or Inferred Consent Necessary?

An important question is whether the man's consent to sperm retrieval and insemination, whether explicitly given or inferred from sufficient evidence, is ethically required. This question arises in the common scenario in which the wife requests retrieval but there is a lack of sufficient evidence to infer either the man's approval or disapproval. It was argued above that the wife's freedom to procreate in this type of scenario is comparable in strength to freedom to procreate in the ordinary scenario; and it was argued that freedom not to procreate after death or PVS is less important than freedom not to procreate in the ordinary context. If one relied only on these considerations, one would conclude that the wife's wishes should prevail. However, there is an opposing ethical argument that a person's gametes, and embryos created with those gametes, should not be used for procreative purposes

⁵⁸Because this is an ethical argument, no particular legal standard of evidence is being put forward. The issue of what legal standard should be used will be discussed below.

without the person's consent, whether explicitly given or inferred from sufficient evidence. An example of a violation of this ethical precept is the well-known misuse of embryos at the infertility clinic of the University of California, Irvine. Embryos were transferred to recipient infertile couples without the consent of the couples who were progenitors of the embryos, resulting in live births in some cases.⁵⁹ The progenitor couples eventually learned about the transfers, and some experienced the anguish of knowing that their genetic children were born into other families. Yet, this use of their embryos would have been wrong even if they had not learned about it and experienced that emotional harm. The reason has to do with the relationship between respect for persons and the special meaning reproduction can have for individuals.

As argued above, freedom to make one's own decisions about procreation is important in part because of the significant meanings procreation can have for persons. Decisions about procreation have a bearing on concerns that are deep, personal, and that go to the core of self-identity. Because of this, respect for persons requires that we permit individuals to make their own reproductive decisions. To make those decisions for others without their concurrence, whether explicitly given to health professionals or inferred from sufficient evidence, is to treat them as mere means and not as ends in themselves. These considerations apply to sperm removal and use after death or PVS; even if it does not cause adverse consequences to the man, use of his sperm for reproductive purposes without explicit or reasonably inferred consent would be disrespectful. This is the main reason why a wife's request for sperm retrieval should not be honored in such circumstances.

E. Objection: Harm to Offspring

A possible objection to the type of procreation being discussed is based on concern for the interests of the child who would be created. This objection focuses on cases in which the offspring would be raised by one surviving parent. Because no father would be involved in rearing the child, it might be claimed that bringing the child into being would be *harmful* to the child. In reply, a serious problem with this objection has been pointed out. Specifically, the objection overlooks the fact that the action that supposedly harms the child is the very action that brings the child into being.⁶⁰ Because the objection fails to consider this, it misuses the concept of "harming". To see this, it is necessary to consider what it means to be harmed. Here we can draw upon Joel Feinberg's useful and thorough discussion of harming. A key point is that *persons are harmed by an action only if they are caused to be worse off than they would have been if the action had not been performed.*⁶¹ The claim that

⁵⁹See, e.g., Cynthia B. Cohen, *Unmanaged Care: The Need to Regulate New Reproductive Technologies in the United States*, 11 *BIOETHICS* 348 (1997).

⁶⁰Carson Strong & Jay S. Schinfeld, *The Single Woman and Artificial Insemination by Donor*, 29 *J. REPROD. MED.* 293 (1984); JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994); STRONG, *supra* note 53, at 85-97.

⁶¹Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 *SOC. PHIL. & POL'Y* 145, 149-53 (1987); JOEL FEINBERG, *HARM TO OTHERS* 31-64 (1984). Feinberg points out that an unusual type of situation is possible, referred to as causal overdetermination. The possibility of this type of situation requires a modification to the necessary condition

creating children after the father dies or enters PVS harms the children who are brought into being, therefore, amounts to saying that the children are worse off than they would have been if they had not been created. Clearly, there are problems with such a statement. Some will say that it fails to make sense because it tries to compare nonexistence with something that exists. Others will claim that it makes sense but is false. The latter claim is based on the view that sometimes it can make sense to say that children are worse off than they would have been if they had not been created; namely, when life is so filled with pain and suffering that these negative experiences greatly overshadow any pleasurable or other positive experiences the children might have. For example, if an infant were born with a painful, debilitating, and fatal genetic disease, it might be reasonable to make such a statement. The view in question goes on to point out that the gap between such an infant and a child raised in a single parent household is exceedingly great. Even if a child experienced some disadvantages in having only one living parent, that would not amount to a life filled with pain and suffering. Thus, it can be argued that it is false that such children are harmed by being brought into existence. Whether false or incoherent, the claim that the children in question are harmed by being brought into being should be rejected.⁶²

F. Request by a Girlfriend

Sometimes a request to retrieve the sperm of a single man is made by a girlfriend or fiancée. It might be asked whether absence of a marital relationship makes it ethically unjustifiable to carry out the request. It can be argued that the lack of marriage does not, in and of itself, make the retrieval unethical. To see this, consider a case in which family members agree, based on previous conversations with the man about this matter, that he would want retrieval followed by insemination of the girlfriend. In this situation, retrieval would promote the man's freedom to make decisions about procreation after death or PVS. Also, respect for the reproductive freedom of the girlfriend is a consideration. The reasons given above for respecting a wife's freedom to procreate would also apply to a girlfriend. Because a number of the reasons for valuing procreative freedom apply to single as well as married people, there are grounds for respecting procreative freedom regardless of whether the persons are married.

VI. PROPOSED LEGAL APPROACHES TO CASES INVOLVING PATIENTS IN PERSISTENT VEGETATIVE STATE

It was argued above that sperm retrieval from patients in PVS is ethically justifiable and should be permitted, in at least some cases. One obstacle to permitting such retrieval is the absence of a legal basis for informed consent in this type of situation. This section discusses various approaches that would make consent possible and permit retrieval legally to be performed in appropriate cases.

One possible approach is to modify Living Will and DPAHC statutes. States could modify their statutes so that they cover not only withholding of life-preserving

stated in the text, but that modification does not affect the analysis provided herein. See Feinberg, *Wrongful Life* at 150-53.

⁶²Further discussion of this argument can be found in Carson Strong et al., *Ethics of Sperm Retrieval after Death or Persistent Vegetative State*, 15 HUM. REPROD. 739, 741-42 (2000).

treatment but also sperm removal and insemination. Of course, many if not most patients who currently execute these documents are well beyond their reproductive years and would not use the documents to authorize sperm extraction. However, if the documents and statutes giving them validity were modified, then younger persons could make use of them to secure their wishes concerning procreation in the event of PVS. Those who execute such documents for sperm retrieval might also express their wishes concerning life-prolonging treatment, thus increasing the utilization of these documents for that purpose, as well.⁶³

A. Common Law Basis for Consent

Where states do not make such changes to Living Will and DPAHC statutes, the legal validity of consent could be based on the common law doctrine of advance directives. The common law recognition of advance directives is based on the concept that persons should be allowed to exercise self-determination with regard to receiving or refusing medical procedures in the event of mental incompetence. This

⁶³For example, a new Living Will statute could be created by using the Uniform Rights of the Terminally Ill Act as a model, but making several modifications to it. First, in section 1 entitled "Definitions", a definition of "irreversible unconsciousness" could be added. The new definition could be stated as follows:

"Irreversible unconsciousness" means an incurable condition in which, in the attending physician's reasonable medical judgment, the patient lacks all consciousness and will not regain consciousness.

Second, two new sections could be inserted after the current section 3, with renumbering of subsequent sections. The new sections could be worded as follows:

§ 4. Declaration Relating to Sperm Retrieval

A male of sound mind and 18 or more years of age may execute at any time a declaration governing the retrieval or nonretrieval of sperm for procreative purposes. The declaration must be signed by the declarant, or another at the declarant's direction, and witnessed by two individuals.

§ 5. When Sperm Retrieval Declaration Operative

A declaration concerning retrieval or nonretrieval of sperm becomes operative when (i) it is communicated to the attending physician and (ii) the declarant is determined by the attending physician to be in a condition of irreversible unconsciousness.

Third, the title of the current section 3 should be modified to distinguish it from the new section 5. The title could be changed to: § 3. When Life-Sustaining Treatment Declaration Operative.

Other provisions of the current Uniform Rights of the Terminally Ill Act would be applicable to the new sections without further changes in wording, including provisions for revoking a declaration. *See* UNIF. RIGHTS OF THE TERMINALLY ILL ACT, 9B U.L.A. 609 (1987).

Current DPAHC statutes could be made applicable to sperm retrieval by adding the following section:

Declaration Relating to Sperm Retrieval

The principal, if a male, may place in his durable power of attorney for health care document a statement authorizing his agent (attorney-in-fact) to consent or withhold consent to retrieval of sperm from the principal for procreative purposes. The principal may also include in the document instructions concerning disposition of the sperm once removed. The inclusion of such statement and instructions in the document authorizes the attorney-in-fact to make decisions in accordance with such statement and instructions.

basic concept appears to apply to any medical procedure that involves a significant intrusion into the patient's body. Therefore, courts' recognition of a right to consent to or refuse medical procedures provides a basis for extending the right to self-determination to sperm retrieval and insemination. Although court decisions to date have focused primarily on the right to *refuse* medical procedures, the underlying concept of self-determination also applies to consent to the *performance* of procedures. Thus, extending common law advance directives to sperm retrieval would be consistent with previous court decisions. Several types of common law advance directives for sperm removal would be possible: Living Wills executed in states that lack Living Will statutes; Living Wills that address sperm retrieval executed in states having Living Will statutes that do not address sperm retrieval; and conversations between the patient and physician. A conversation in which the patient tells the physician he would want sperm retrieval could be considered to constitute explicit prior consent.⁶⁴

The common law doctrine of substituted judgment could also be applied to sperm retrieval and insemination. If there were sufficient evidence that the patient would, or would not, want sperm removal, then the next of kin could speak on behalf of the patient. Although court decisions involving substituted judgment have mainly dealt with removal of life-preserving treatment, the underlying concept of patient self-determination provides a basis for extending such surrogate decision making to sperm retrieval cases. Evidence of the patient's wishes could derive from Living Wills, DPAHC documents, or statements by family members concerning the patient's wishes. If the evidence presented to the physician consists primarily of statements made by the spouse or other family members, then it is necessary to consider whether such statements would constitute sufficient evidence to infer the patient's wishes.

In exploring what would count as sufficient evidence, let us consider a typical clinical scenario, in which there is absence of explicit prior consent but family members state that the man would have wanted the retrieval and there is no disagreement about this among the family. A problem that arises is that the family members have a conflict of interest. A surviving wife's statement that her husband would have wanted his sperm extracted might be biased by her own interest in becoming pregnant. Parents of the man, parents of the surviving wife, or other relatives could also be biased by their own interests or the interests of other family members. Therefore, it can be argued, such statements do not constitute reliable evidence of the man's wishes.

One might seek a solution to this problem of bias by asking whether there are independent reasons for thinking that the man would agree to sperm extraction. For example, is it reasonable to assert that a married man with no children would agree to his wife's being inseminated with his sperm? One could point out the strong desire to procreate of most married couples. Specifically, it could be claimed that most married men want to beget children with their wives. Many men want to have children who will carry on the family line after they die. Furthermore, a man might

⁶⁴If the legal authority of the patient to consent, by means of advance directives, to sperm retrieval and insemination after PVS becomes established in the future, then DPA statutes could be used to appoint an agent for the express purpose of consenting to such procedures. The concern that an agent cannot do what the principal is not authorized to do would have been overcome.

agree to retrieval if he knew (somehow) that his wife wanted it. This reasoning is supported if we make the assumption, which seems plausible at least sometimes, that a married man would want to promote the interests of his surviving wife. However, other considerations pull us toward the opposite conclusion. Some men might not want to beget children in circumstances where they would be unable to take part in rearing. If they cannot influence the child's development, then they might not be interested in carrying on the family line. Because of these conflicting possibilities, it is difficult to maintain that there are independent grounds for thinking that the man would consent. If he had never discussed these matters with family or friends, then attempts to infer his wishes would be speculative.

However, there is a type of situation in which there could be sufficient evidence to justify a conclusion that the patient would consent, despite the family's conflict of interest and the absence of explicit prior consent. If the patient had discussed sperm retrieval after PVS with his family and had stated that he would approve of it, then such statements could overcome the problem of family bias, in at least some cases. Here the evidence would consist of, not simply the family's attempt to guess what the patient would want, but accounts of what he had actually said about sperm retrieval and insemination. One can even imagine scenarios in which families present signed written statements made by the patient when competent, expressing a desire for sperm retrieval after onset of PVS. Such documents could be useful to courts in deciding whether there is sufficient evidence of the patient's wishes. Although cases to date have not involved patients who made such statements, verbal or written, future cases might involve such patients, given that the topic is being discussed more widely.

In contrast, there might be cases in which family members give differing accounts of the patient's previous statements and disagree over whether he would approve sperm extraction. In such situations, if there are no written statements by the patient, one might conclude that there is not sufficient evidence that he would want the retrieval.

The question will arise concerning what standard of evidence courts should use in determining the incompetent patient's wishes. With regard to determining the wishes of incompetent patients concerning life-preserving treatment, the Supreme Court has held that it is constitutional for states to have at least some degree of freedom in deciding the standard of evidence to be used.⁶⁵ A similar argument would seem to apply to determining an incompetent patient's wishes concerning sperm retrieval after onset of PVS; states should have at least some range of freedom in deciding the standard of evidence. With regard to life-preserving treatment, several states have required the standard of clear and convincing evidence. This standard has been held to be appropriate when the individual interests at stake are both particularly important and more substantial than mere loss of money.⁶⁶ States that have used this standard have considered it suitable because of the importance of the state interest in preserving life. It might similarly be claimed that the interest in avoiding unwanted procreation is sufficiently important to warrant a standard of clear and convincing evidence in determining whether a patient in PVS would want sperm retrieval.

⁶⁵Specifically, the Court ruled that it is constitutional for Missouri to use the standard of clear and convincing evidence. *See Cruzan*, 497 U.S. at 284.

⁶⁶*Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

Courts should regard the man's consent, whether explicitly given or inferred from sufficient evidence, as a requirement for the legal removal of sperm and subsequent insemination. This legal approach is supported by the ethical argument, given above, that sperm should not be removed without the man's explicit prior or reasonably inferred approval.

B. Constitutional Right to Privacy

Should the constitutionally protected freedom to procreate extend to procreation after onset of PVS? Based on considerations given above, it can be argued that it should. It was shown that some of the reasons freedom to procreate in the ordinary context is important to persons also apply to procreation after PVS. This provides a rationale for giving at least some degree of protection to freedom to procreate after onset of PVS. However, we must consider the *strength* of protection that is warranted. The constitutional right to privacy set forth in *Griswold* and subsequent Supreme Court cases involving procreation has been regarded by the Court as a *fundamental* right. Thus, it is included among an especially important set of rights, described as being necessary for the "concept of ordered liberty".⁶⁷ As such, these rights deserve a standard of *strict scrutiny*, meaning that infringement of them is justified only if there is a *compelling state interest* and the infringement is narrowly tailored to meet that state interest.⁶⁸ We need to consider whether strict scrutiny is appropriate for the right to procreate after onset of PVS. As argued above, the interest in procreating after PVS is not as strong as the interest in procreating in the ordinary context. For this reason, if a constitutional right to privacy were recognized in this area, it would be difficult to argue that it should be regarded as a fundamental right deserving strict scrutiny. At best, a nonfundamental right to procreate after onset of PVS would be warranted, for which a *rational basis* test would be sufficient to justify interference.⁶⁹

The right to privacy of the surviving spouse is a different matter. Procreation using her husband's sperm would occur when she is alive and conscious. As argued previously, her freedom to procreate in this situation should be regarded as comparable in importance to freedom to procreate in the ordinary scenario. Freedom to choose the source of sperm for insemination is an aspect of her fundamental right to privacy. As such, it calls for strict scrutiny. Thus, we reach an interesting conclusion: when the man in PVS would want sperm retrieval and insemination of his wife, and the wife wants these procedures to be performed, state interference requires strict scrutiny, despite the man's lack of a fundamental right, because the wife's right to privacy is a fundamental right.

This does not mean, however, that she is legally entitled to have sperm removed in the absence of sufficient evidence that the man would want this done. It was argued above that it is wrong to use persons' gametes for procreative purposes without their consent. The man's explicit prior consent, or sufficient evidence that he would approve, would be necessary.

⁶⁷See, e.g., *Roe*, 410 U.S. at 152; *Griswold*, 381 U.S. at 500; *Palko v. Connecticut*, 302 U.S. 319, 325, 328 (1937); Notes, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 681 (1973).

⁶⁸*Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

⁶⁹See Robertson, *supra* note 57, at 1040-1042.

Another issue is whether the constitutionally protected interest in refusing unwanted medical treatment extends to refusal of sperm retrieval. This issue would arise in situations in which there is sufficient evidence that the man would not want sperm extraction to be performed, although the spouse or other next of kin is requesting the procedure. It seems reasonable to conclude that, just as a man has a right to refuse medical treatment, he should be considered to have a right to refuse sperm removal. It might be objected that sperm retrieval is not "treatment", and therefore the right to refuse treatment does not apply, strictly speaking. However, the right to refuse treatment is based on a more general right to bodily self-determination, which is broad enough to encompass a right to refuse sperm retrieval.⁷⁰

If there is a right to refuse sperm retrieval based on the constitutional right to refuse medical treatment, the strength of these rights remains an open question. In *Cruzan*, although the Supreme Court recognized that a competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment, it held that this "does not mean that an incompetent person should possess the *same* right," since such a person is unable to make a voluntary and informed choice to exercise that right.⁷¹ Moreover, the Court refrained from stating that the incompetent person's right to refuse treatment is fundamental. On the other hand, in their dissent Justices Brennan, Marshall, and Blackmun argued that the incompetent patient's right to refuse medical treatment *is* fundamental.⁷² How the Supreme Court will eventually decide this issue remains to be seen. If the view of Justices Brennan, Marshall, and Blackmun prevails in the future, then one could argue that the right to refuse sperm retrieval that derives from the constitutional right to refuse medical procedures is a fundamental right requiring strict scrutiny. In that event, one could argue that a constitutional right to refuse sperm retrieval is derivable from two sources—a fundamental right to refuse treatment and a nonfundamental right to avoid procreation. In that situation, the right to refuse sperm retrieval, in effect, would be fundamental.

VII. PROPOSED LEGAL APPROACHES TO CASES INVOLVING DEAD PATIENTS

If postmortem sperm retrieval and insemination should sometimes be permitted, then there is a need to establish the legal validity of consent to such retrieval and insemination. Because the law concerning disposition of dead bodies differs from the law concerning treatment of incompetent patients, changes in the law that are needed to make consent possible are different in these two types of scenarios.

Common law has not required that the disposition of dead bodies be in accordance with the wishes of the deceased, assuming those wishes are known, nor has it generally recognized the decedent's wishes as constituting consent which would authorize medical procedures to be performed on the cadaver. Thus, it appears that there is no clear precedent in common law that can be used to create in the decedent's wishes a power to authorize sperm retrieval. Moreover, the next of kin's right is limited to decisions about burial or cremation; any other right of the

⁷⁰*Schloendorff*, 105 N.E. 92.

⁷¹*Cruzan*, 497 U.S. at 262, 279-80 (*emphasis added*).

⁷²*Cruzan*, 497 U.S. at 301-330.

next of kin to make decisions about the cadaver must be conferred by statute. These considerations suggest that changes in the common law to authorize consent for postmortem sperm retrieval are not forthcoming. Changes to authorize such consent would have to be statutory.

As discussed above, the UAGA is not applicable to postmortem sperm retrieval for procreative purposes. One approach to legal change would involve states enacting legislation stating that a man's explicit prior consent to postmortem sperm retrieval and insemination constitutes legally valid consent. Such statutes should also empower the next of kin to consent on behalf of the patient to sperm retrieval and insemination, provided there is sufficient evidence the deceased would have wanted such procedures to be performed. Statutes should require that sperm retrieval from dead patients not occur unless the patient had given explicit prior consent or there is sufficient evidence to conclude that he would approve. Given the next of kin's potential conflict of interest, such evidence should be based on conversations or written statements by the deceased expressing a desire for such procedures. States should have a certain degree of freedom in deciding the standard of evidence to be used. A standard of clear and convincing evidence would be reasonable, given the importance of freedom to avoid unwanted procreation.⁷³

Although there is no basis in common law for authorizing postmortem sperm retrieval, at least one case has dealt with postmortem insemination. The *Hecht*⁷⁴ decision recognized the interest of gamete providers to decide the disposition of their gametes following death, and other courts should follow *Hecht* in this regard. Courts should recognize explicit prior consent as constituting legally valid consent to insemination. To be valid, such consent would have to address the question of

⁷³Such a statute might have the following form:

Consent to Postmortem Sperm Retrieval Act

§ 1. Explicit Prior Consent

A male of sound mind and 18 or more years of age may give explicit consent to a physician for postmortem retrieval of his sperm and use of such sperm for artificial insemination of a woman designated by the sperm donor. Such consent, if documented in the sperm donor's medical record, shall constitute legally valid consent.

§ 2. Declaration of Intent, and Consent by Next of Kin

A male of sound mind and 18 or more years of age may execute a declaration governing the postmortem retrieval or nonretrieval of his sperm for procreative purposes and, in the event of retrieval, the use of such sperm for artificial insemination. The declaration must be signed by the declarant, or another at the declarant's direction, and witnessed by two individuals. After the declarant's death, the next of kin shall be authorized to consent to or refuse sperm retrieval and insemination on behalf of the declarant, provided such consent or refusal is in accordance with the declaration.

§ 3. Explicit or Inferred Consent Required

Postmortem sperm retrieval for procreative purposes, and subsequent artificial insemination, shall not be performed unless the decedent had given explicit prior consent in accordance with section 1 or there is clear and convincing evidence he would have approved the performance of these procedures. Clear and convincing evidence would include, but is not necessarily limited to, a declaration made in accordance with section 2.

⁷⁴*Hecht*, 16 Cal. App. 4th 836 (1993).

whom the man wishes to be inseminated. Use of his sperm to inseminate someone other than the person he specified would violate his freedom not to procreate.⁷⁵ Courts also should recognize the next of kin, or other legally authorized representative, as having the ability to consent to postmortem insemination on behalf of the decedent, provided there is sufficient evidence the decedent would have wanted the insemination to take place. Given the potential conflict of interest, such evidence should be based on conversations or written statements by the deceased expressing a desire for such insemination. Courts should not permit postmortem insemination unless the decedent gave explicit prior consent or there is sufficient evidence he would have wanted the insemination to occur.

It can be argued that the constitutionally protected freedom to procreate should apply to postmortem procreation. Some of the reasons freedom to procreate in the ordinary scenario is important to persons also apply to postmortem procreation. This provides a basis for giving at least some degree of protection to freedom to have one's gametes used for procreative purposes after death. Thus, a legal justification for honoring a man's request for postmortem sperm retrieval and insemination could rest on the constitutional right to privacy. As in the case of freedom to procreate after onset of PVS, it is difficult to argue that freedom to have one's gametes (or embryos) used for procreation after death is a *fundamental* right requiring strict scrutiny. Rather, a rational basis test would appear sufficient to justify state interference with such freedom. In cases where the deceased had wanted sperm retrieval and insemination of his wife, and the wife wants these procedures performed, state interference would require the test of strict scrutiny because her right to privacy should be regarded as fundamental.

Also, the constitutionally protected freedom not to procreate should be interpreted as including freedom to refuse postmortem sperm retrieval and subsequent insemination. Some of the reasons freedom not to procreate in the ordinary scenario is important to persons also apply to procreation after death. As argued earlier, the ethical principle of respect for persons requires that sperm not be removed contrary to the man's wishes.

VIII. CONCLUSION

Currently no statutes in the U.S. authorize the patient or next of kin to consent to sperm retrieval or insemination after death or onset of PVS. Also, there is no basis in common law for the next of kin to consent to postmortem sperm retrieval and insemination. The question of whether consent in PVS cases can be based on the common law of advance directives or the common law authority of the next of kin has not been adjudicated by any court. Similarly, no court has ruled on the question of whether a patient may consent in advance to postmortem sperm retrieval. Moreover, the issue of whether the constitutional right to privacy should be extended to the area of sperm retrieval and insemination after death or PVS has not been adjudicated. On the other hand, there is no current legal requirement to have the

⁷⁵It is possible that an inferred approval of the choice of recipient could be based on the man's previous selection of a person to make that decision for him, as in a Durable Power of Attorney. For example, a single man might appoint a family member to make decisions for him concerning sperm removal and insemination after death, including decisions about selection of a procreative partner.

patient's explicit prior or reasonably inferred consent to sperm retrieval and insemination after death or PVS.

It has been argued in this paper that sperm retrieval and insemination after death or onset of PVS should be permitted, provided the man has given explicit prior consent or there is sufficient evidence to conclude he would approve of such procedures. If this argument is correct, then the law should provide a way for consent to be given in such cases. There are several ways this could be done: by passing legislation that explicitly addresses these areas; by extending the common law doctrines of advance directives and substituted judgment to cases involving PVS; and by extending constitutionally-based freedoms to procreate (or not procreate) and to refuse medical procedures to cases involving PVS or death. It has also been argued in this paper that sperm retrieval and insemination should not occur unless the man has given explicit prior consent or there is sufficient evidence to conclude that he would agree to these procedures being performed.